No. 93-769

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO CLC,
Petitioner,

v.

STEPHEN T. AGUINAGA, WAYNE PAPPAN and JANET BROWN, individually and on behalf of all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. THERE ARE NO PROCEDURAL BARS TO REVIEW

In an approach that manifests a deeply felt need to pretermit consideration of the question presented here short of the merits, respondents begin their opposition brief by dredging up from the court of appeals phase of this case and from the district court phase two supposed procedural bars to review by this Court. Neither is of any substance as the court of appeals—which decided the question raised in the petition on the merits—recognized.

(a) Respondents assert that the petition for rehearing in the court of appeals was filed a day late, with the result that the *certiorari* petition is untimely. Brief in Opposition at 10-11. But, in point of fact, the rehearing petition in the court of appeals was timely filed and was treated by the court below as timely filed.

In response to a motion by petitioners, the court of appeals entered an order extending the time for filing for rehearing to and including June 16, 1993. To be certain of that order's import, on June 10, 1993, Kimberly Victor, a paralegal at Donovan, Leisure, Rogovin, Huge & Schiller, the law firm representing petitioner in the court below, spoke to Teresa Smith in the Clerk's Office of the Tenth Circuit, and was advised that the order required that the rehearing papers be deposited in the United States mails by June 16, with a proper certification of that action, and that the order did *not* require that these documents be in the court of appeals' hands as of June 16. There is no dispute that petitioners complied with the order in those terms.

Consistent with that June 10, 1993 confirmation of *its* order's meaning, the court of appeals treated the rehearing papers as timely filed and ruled on the request for rehearing and the suggestion for rehearing *en banc* on their merits. *See* Pet. App. at 100a-101a. It is, we submit, too plain for argument that the court of appeals'

reading of its own order extending a time limit is dispositive.

(b) Respondents maintain that the question presented in the *certiorari* petition is foreclosed because that question was not raised in a motion for directed verdict in the district court. Brief in Opposition at 12.[1] Respondents raised this procedural defense in the court of appeals. That court rejected "Plaintiffs' contention that the Union has waived its arguments on appeal because it failed to seek a directed verdict on the same grounds," Pet. App. at 8a, and ruled on the exhaustion issue on the merits.[2] The court below, stating that the critical consideration is whether "the trial court is aware of the mov-

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[1] Respondents also note that petitioner did not object to the district court's instruction to the jury on the "futility" issue. *Id.* at 11. However, the error below was not in the instructions; the error was that the case should never have gone to the jury because the evidence did not permit a determination that respondents were free to bypass the grievance-arbitration procedure. *See infra* at 3-10.

[2] In their brief to the court of appeals, respondents stated: "In [its] directed verdict motion, the Union made no argument whatsoever that it was entitled to judgment . . . based upon a failure to exhaust . . . . [T]he Union cannot now argue that there was insufficient evidence to submit these issues to the jury." Plaintiffs/Appellants' Reply Brief and Plaintiffs/Cross Appellees' Responsive Brief, at 6. The UFCW argued in response that it was not necessary to include the exhaustion issue in a motion for directed verdict because the issue "was raised at numerous junctures below and was ruled upon in each instance." Appellee/Cross Appellant's Reply Brief, at 3.

As the UFCW explained, the exhaustion issue first had been raised in a motion to dismiss, D. App. at 1-2, then in a motion for summary judgment, *id.* at 52-55, which was denied "without prejudice," *id.* at 56-58, then in a motion to vacate the jury verdict and to dismiss on jurisdictional grounds, or alternatively for summary judgment, *id.* at 264-266, and finally in a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, *id.* at 267-269. In ruling on the JNOV motion the district court addressed the merits of the UFCW's exhaustion argument. Pet. App. at 40a-41a. It therefore is evident that the district court —like the court of appeals—rejected respondents' position that the exhaustion issue had not been preserved.

ant's position," held that the question presented here had been adequately raised and preserved. Pet. App. at 8a. Respondents do not provide any basis for concluding that the court of appeals erred in this regard.

II. THE QUESTION PRESENTED WARRANTS REVIEW BY THIS COURT, AND THIS CASE PROVIDES AN APPROPRIATE VEHICLE TO RESOLVE THAT QUESTION

The reason that respondents labor so hard to create procedural obstacles to review becomes apparent upon reading respondents' treatment of the merits: what respondents offer in opposition to review serves only to confirm that this petition should be granted.

The question presented here is what set of circumstances—if any—permit an employee to proceed directly in federal court with a claim of breach of a collective bargaining agreement, when the employee has not even requested his collective bargaining representative to invoke the grievance-arbitration procedure established by the agreement, and favored by the national labor policy, as the exclusive method for resolving claims arising under the agreement.

The courts below held that although the respondent employees never made the simple request that a grievance be filed, that failure should be excused because a jury found that it would have been "futile" for respondents to have made such a request. That finding was predicated on the jury's hypothesizing, from disputed facts as to matters at several removes, what petitioner UFCW would have done —and why it would have done so—had respondents sought to initiate a grievance. *See* Petition at 11-12.

It is our submission on the merits that such speculation is insufficient to overcome the national labor policy favoring resort to contractual grievance-arbitration processes. *See* Petition at 18-21. And it is our further submission that the question we present is of great importance in the labor law and in allocating the resolution of collective

bargaining disputes between private arbitration and the federal courts, is an open one in this Court, and has caused confusion and conflict in the courts of appeals.

A.

Respondents declare that "this Court's decisions have [already] supplied" the answer to the question presented here. Brief in Opposition at 15. That is not so. This Court has *not* decided any case in which an employee seeking judicial determination of a claim of a breach of a collective bargaining agreement had *never* even asked the union to file a grievance relating to the conduct of which he complains. *See* Petition at 14-15.

Respondents also assert that the differences in how the various circuits have approached the question of "futility" are "minor." Brief in Opposition at 14-15. But the circuit law is in disarray: at least one court of appeals appears to proceed on the premise that an employee's complete failure to request the union to proceed with his grievance necessarily is fatal to a federal court breach of contract suit, *see Carr v. Pacific Maritime Ass'n*, 904 F.2d 1313, 1317-18 (9th Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991); other courts allow such a suit to proceed if there is "a clear and positive showing of futility," *Terwilliger v. Greyhound Lines, Inc.*, 882 F.2d 1033, 1039 (6th Cir. 1989); and other courts—most notably, the court below—require much less. *See* Petition at 15-17.

Respondents declare that the decisions of this Court and of the various circuits all stand for the uniform proposition that "determining when exhaustion of contractual remedies is futile is a factually intensive undertaking." Brief in Opposition at 15. With all respect, respondents' declaration that this is the only "truth told by the various cases" in point, *id.*, is an admission against interest. The fact that the lower court cases on this threshold jurisdictional issue have not generated any meaningful legal standard, and that, as a result, juries are left at large to decide in each case whether the national labor policy fav-

oring resort to contractual grievance-arbitration processes will be honored, or whether, instead, an employee who never requested that a grievance be filed will be permitted to take his contract claim to federal court, demonstrates the need for this Court's review.

B.

Respondents' shifting explanations as to why it would have been futile in this case to have requested that a grievance be filed only serve to underscore that the decision below cannot be reconciled in any principled way with the national labor policy and with the decisions of other circuits.

1. Respondents make much of the contention that the International Union's attorneys, even though they had not been asked by respondents to file a grievance, considered and rejected the option of having the International initiate a grievance on its own. Brief in Opposition at 17-19. The court below did not even mention this contention, and it is unavailing.

As we have noted, the *Local* Union—which was held to be an entirely faithful collective bargaining representative for respondents—could have processed a grievance. *See* Petition at 4. Evidence as to whether the *International* Union and its attorneys viewed the filing of such a grievance as fruitful is thus beside the point. In any event, as we show in the margin, the evidence respondents cite does not even indicate that the *International* was disposed against a grievance concerning Morrell's breach of Section 10 of the 1979 Agreement.[3]

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[3] Respondents begin by quoting testimony that did not even concern a possible grievance involving section 10 of the Agreement but concerned a possible grievance involving sections *12 or 13*. *See* P. Supp. App. at 218-219, quoted in part in the Brief in Opposition at 18 and n.42. Those sections prohibited discrimination on the basis of union membership (section 12) and required that preference in hiring be given to former Morrell employees (section 13). P. App. at 234. Those provisions were relevant to the question whether Morrell had committed a contract violation by engaging in discriminatory *hiring* when the Arkansas City plant

Other circuits have refused to excuse employees for having failed to request a grievance in circumstances where the union officials *who would be responsible for processing any grievance* had expressed much clearer hostility to the potential grievance than was expressed here by any representatives of the *International* Union, let alone by any representatives of the *Local* Union. *See* cases cited in the Petition at 16-17 and n.27.

2. After quoting the *only* communication by the International Union concerning the filing by the International of an unfair labor practice charge—a communication that does not suggest in any way that the decision to file a charge would somehow prevent the filing by the Local Union of a section 10 grievance, *see* Petition at 7—respondents assert that "[c]lass members understood Petitioner-union's notice to indicate that the petitioner would enforce the Master Agreement before the NLRB, and that they had to do nothing further to obtain enforcement of this contract." Brief in Opposition at 18 and n.45, citing P. Supp. App. at 214-215. *See also* Brief in Opposition at 7 and n.22 (citing the same testimony).

The UFCW's notice cannot possibly be read to assert that there was no reason for the employees to consider filing a grievance that supplemented the International's unfair labor practice charge. Certainly there is nothing

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was reopened in a new guise. That question is entirely distinct from the section 10 issue of a frauduent *closing* involved in this case.

Respondents go on to quote testimony that UFCW attorneys believed that filing an unfair labor practice charge was a "better position" than filing a grievance. Brief in Opposition at 18, quoting P. Supp. App. at 242-243. *See also* D. App. at 1127 (cited in Brief in Opposition at 7 and n.24) (UFCW believed that filing an unfair labor practice charge was "the best possible way" to attempt to improve wages at the Arkansas City plant.) Such testimony that the International Union, in considering what steps to take on its own, viewed an unfair labor practice charge as the best strategy does not suggest in the least that the International Union somehow would have prevented the Local Union from pursuing a section 10 grievance.

in the notice so much as suggesting that the unfair labor practice charge was equivalent to a grievance raising every possible claim that Morrell had breached the collective bargaining agreement, including particularly the claim for breach of section 10 that respondents eventually asserted in this case.[4]

There is, moreover, no evidence that respondents were misled in any way by the notice concerning the unfair labor practice charge. In the sole snippet of testimony respondents cite on this point, plaintiff Aguinaga merely testified that he took no steps to protect his interests because he had believed "for years that [the International Union] would take care of us."[5] To suggest that an

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[4] As noted, there was testimony that the International Union viewed the unfair labor practice charge as the most effective means of litigating the issue of *discrimination in hiring* in connection with the reopening of the Arkansas City plant, which is distinct from the issues involved in this suit. *See supra* note 3.

[5] *See* P. Supp. App. at 214-215 (cited in Brief in Opposition at 7 n.22, 18 n.45):

Q. What specifically did you do when you found out that the plant was going to reopen?

A. I did nothing.

Q. Why is that?

A. Well, after the plant opened a little while I just kind of sat back and I wanted to see what was going to happen, you know, they closed down, they opened back up which I knew there was provision in the contract that covered the opening and closing of packing houses and I just kind of set back and didn't do anything. Then the International Union filed charges against them and I thought, well, here we go again, the union is going to take care of it, they are going to take care of it.

Q. Why did you think the union would take care of it?

A. Well, this was drilled into us for years that they would take care of us and I had no other reason to believe that, than to believe that the International Union was going to stop this thing from happening.

Q. Because of the violation you thought that had occurred?

A. Yes.

Q. And did you follow the proceedings and the charge?

[Continued]

employee is excused from requesting that a grievance be filed merely because the employee has faith that the union will always take every possible step on its own is to drain the exhaustion requirement of all meaning.

3. Even if the filing and pendency of the unfair labor practice charge constituted a basis for excusing respondents' failure to request that a grievance be filed, that excuse by its own logic ended when the charge was withdrawn.[6] Respondents seek to bury that problem by asserting that "[a]t this point, filing a grievance would have been untimely." Brief in Opposition at 8. But respondents do not explain why, if their section 10 claim was timely when it was asserted in federal court, it would not have been timely had it been asserted in the grievance process instead.

As the D.C. Circuit explained in *Le Boutillier v. Air Line Pilots Ass'n*, 778 F.2d 883 (D.C. Cir. 1985), the contention that a grievance might have been found to be untimely does not provide "even a wisp of feasible argument justifying [the employee's] utter disregard of the contractual [grievance] procedure." *Id.* at 885. "Had [the employees] invoked the [grievance] procedure only to be turned away for filing too late, this would be a different case, one on which we express no opinion. But [the employees] never put [their] 'futility' theory to the test by filing a [grievance]. . . ." *Id. See generally Nolde Bros. Inc. v. Bakery Workers*, 430 U.S 243, 251 (1977) (grievance arising under collective bargaining agreement remains arbitrable after expiration of the agreement).

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[5] [Continued]

A. To a certain extent. It was mostly just talking to people and finding out what was going to happen. I didn't actually pursue it with the union personnel or anybody like that to find out because I was concerned about my new job and I was more concerned about that than anything right at that time because I was working a lot of hours and I felt real fortunate to be working.

[6] Respondents distort the record concerning the UFCW's decision to withdraw the charge. *Compare* Brief in Opposition at 7-8 *with* Petition at 8.

4. After running through all of the foregoing alternative justifications for a finding of "futility," respondents place their greatest emphasis on yet another theory, *viz.*, that in the side letters to the 1982 collective bargaining agreement with Morrell the UFCW "had already agreed to cancel respondents' rights under the old [1979] agreement." Brief in Opposition at 16. *See also id.* at 3-5.

We already have shown that the side letters cannot bear the meaning respondents now would place on them: by their express terms, the side letters dealt only with the question whether the *opening* of a plant, *without more,* would violate the *1982* Master Agreement, and the letters cannot fairly be read to have waived claims that the *closing* of the Rodeo plant, for a *prohibited purpose,* had violated section 10 of the *1979* Master Agreement. *See* Petition at 11 n.25. The UFCW, at least, never interpreted the side letters as having had such a purpose or effect.[7] Any dispute on this score was itself a matter to be resolved through the grievance-arbitration process; not a matter that justifies *bypassing* that process.

C.

The Brief in Opposition's resort to an ever-shifting series of hypotheses, one more strained than the other, in an effort to explain how the jury might have concluded that it would have been "futile" for respondents to have

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[7] Respondents note that in responding to the UFCW's unfair labor practice charge, Morrell declared to the NLRB that the Company interpreted the 1982 side letters as releasing all rights under the 1979 Agreement. Brief in Opposition at 16 n.39, citing D. App. at 629-642. (To the same effect, respondents quote self-serving deposition testimony of Morrell officers whom respondents elsewhere accuse of deceit. Brief in Opposition at 4). Respondents fail to note that the very submission to the NLRB in which Morrell expressed its purported understanding of the side letters shows that UFCW strongly disagreed with Morrell's interpretation and took the position, just as the UFCW has done throughout this litigation, that the side letters did *not* give up respondents' section 10 rights. D. App. at 636-637. Such disputes are grist for the arbitral mill.

requested the filing of a grievance, does *not* mean that the question presented by the *certiorari* petition is itself fact-intensive. Rather, the Brief in Opposition is an unwitting testament to the fact that this case presents in sharp relief the adverse consequences of a rule of law that leaves employees free to bring their contract claims to federal court without ever having made the simple request that a grievance be filed. As this case illustrates, in the absence of clear legal parameters, a jury is left to speculate as to what might or might not have happened had such a request been made, and effectuation of the national labor policy is left to depend on the result of that speculation.

None of the shifting theories respondents advance comes close to explaining why respondents chose to bypass the grievance-arbitration system and to sue in federal court instead—much less to excuse their choice. Of course, the attorneys' fees awarded to respondents' counsel—more than half a million dollars, *see* Petition at 4 n.5—would not have been available in grievance arbitration; and in that forum respondents would have presented their contract claims to an arbitrator rather than to a jury. Such considerations may help to explain the "depressingly large number of recent cases grow[ing] out of refusals to use or abide by the grievance-arbitration machinery of collective-bargaining agreements." *Bailey v. Bicknell Minerals, Inc.*, 819 F.2d 690, 691 (7th Cir. 1987) (Easterbrook, J.). But these are the very considerations that, under the national labor policy, argue in favor of requiring resort to grievance--arbitration procedures rather than to litigation. *See* cases cited in Petition at 19-20.

CONCLUSION

For the foregoing reasons and those stated in the Petition, this Court should grant the petition for certiorari.

Respectfully submitted,

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